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Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1531

ASSOCIATED MILK PRODUCERS, INC.
V. UNITED STATES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

IN RE: 1975-2 GRAND JURY INVESTIGATION OF ASSOCIATED MILK PRODUCERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Associated Milk Producers, Inc. (hereafter "AMPI") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit dismissing AMPI's appeal in this case is included herein as Appendix 1 and has not yet been officially reported. The district court's orders from which this appeal was taken are included herein as Appendix 2 and have not been officially reported.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit dismissing AMPI's appeal in this case was issued on February 6, 1978. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 3, 1978. On March 21, 1978 the Court of Appeals stayed the issuance of the mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, until April 20, 1978. On April 18, 1978 the mandate was further stayed until April 26, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

THE QUESTIONS PRESENTED

Whether an order refusing to expunge a grand jury transcript and return all documents is appealable as a final order under 28 U.S.C. § 1291 (1970) after the grand jury investigation has terminated without the return of an indictment and under circumstances where no further government investigation or prosecution is pending or contemplated.

Whether an order transferring information collected in a grand jury investigation to another jurisdiction in another Circuit for use in a totally independent private proceeding is appealable as a final order under 28 U.S.C. §1291 (1970).

Where the initiation of the grand jury investigation was unauthorized, where the prosecution was improperly selective, where there was misconduct by the government prosecutors, and where the target of the investigation sought to enjoin it at its inception, whether the finality requirement of 28 U.S.C. § 1291

(1970) can be used to permanently deny the target relief that will place it in the same position in which it would have been if the investigation had not been commenced, or permitted to go forward.

Whether an order granting intervention under Federal Rule of Civil Procedure 24(a)(2) is appealable at the conclusion of the proceeding.

STATUTE INVOLVED

28 U.S.C. § 1291 (1970) provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

At issue in this case are the appealability of four orders issued by Chief Judge Spears of the United States District Court for the Western District of Texas relating to a federal grand jury investigation of AMPI. The grand jury investigation commenced approximately in early February 1975; the Grand Jury was discharged on August 6, 1976—after exhaustion of almost the full 18 months of its life—without the return of any indictment. In fact, the grand jury was not permitted to deliberate about whether an indictment would be returned since the United States refused to present any indictment. When the grand jury investigation was terminated, there were no related government suits or investigations pending or contemplated. Further, the government stated that it had no further interest in the documents produced in response to grand jury subpoenas.

From the outset of the grand jury investigation, AMPI contended that the prosecutors, who were not regular United States Attorneys, did not have proper authority to conduct the investigation. Their authority purported to seem not from the Attorney General, but only from the Assistant Attorney General of the Antitrust Division, although that Assistant Attorney General had not been delegated authority to authorize or conduct grand jury investigations outside of the antitrust and trade regulation field. The grand jury investigation related to obstruction of justice and similar matters. At that time, the only delegation of authority permitting the Assistant Attorney General in charge of the Antitrust Division to designate attorneys to conduct grand jury investigations pertained to cases brought to enforce the laws relating to competition and consumer protection, *see* 28 C.F.R. §§ 0.40(a), 0.43 (1976); 39 Fed. Reg. 25487 (1974).[1] AMPI also contended that the investigation was improper in that never before in the history of more than 100 years of the contempt and obstruction of justice statutes had a prosecution been initiated involving discovery in a civil case, and that for this and other reasons, the investigation had been initiated and was being carried out for impermissible motives constituting a misuse of the grand jury process.

The grand jury investigation was under the supervision of Chief Judge Spears of the Western District of Texas. Upon receipt of the first subpoena, at the

[1] On November 18, 1975, long after the initiation of the grand jury investigation in this case, Antitrust Division attorneys were authorized to present evidence to grand juries in certain types of obstruction of justice investigations. 28 C.F.R. § 0.179(a) (1977), 40 Fed. Reg. 53390 (1975).

commencement of the investigation, AMPI sought to enjoin the grand jury investigation on the grounds that the prosecutors were unauthorized and had improperly selected AMPI for prosecution. On February 19, 1975, Chief Judge Spears denied AMPI's motions and ordered that the subpoena be enforced. On May 6, 1975, Chief Judge Spears denied AMPI's motion for reconsideration of its motion to stay the grand jury proceedings.

On August 6, 1976 when the grand jury was discharged without the Government having presented it with the opportunity to return an indictment, the investigation of alleged obstruction of justice was terminated, and the Government disavowed any further interest in the documents which AMPI had produced pursuant to grand jury subpoenas. On the day of its discharge, the grand jury made three requests of Chief Judge Spears, including a request that AMPI's business files and records received by the grand jury "be made available to other courts pursuant to an appropriate Rule 6(e) motion." On the same day, Judge Spears acted on these requests, and the request that AMPI records be made available to other courts was not granted.[2] At this point in time—August 6, 1976, when the grand jury was discharged, when there was no pending or contemplated government prosecution or investigation of AMPI, and when the government had no further interest in the grand jury documents—the prior orders of February 19 and May 6, 1975, became final and appealable. Such orders had

[2] The Grand Jury's letter to Chief Judge Spears of August 6, 1975 and Chief Judge Spears' Order of the same day are reprinted in Appendix 3.

denied AMPI's request to enjoin the grand jury investigation. On appeal from these orders, in order to place AMPI in the same position as if the grand jury investigation had not commenced, or had not been permitted to go forward, AMPI sought return of its documents and expungement of the grand jury record.

Approximately three weeks after the grand jury investigation was terminated, on August 25, 1976, attorneys for the Antitrust Division initiated an independent, *ex parte* proceeding in the Western District of Texas in which the Government sought, contrary to the grand jury's own request, to have all of the grand jury transcripts, documents and other materials transferred to Chief Judge Oliver of the Western District of Missouri for the acknowledged purpose of aiding the plaintiffs in private antitrust suits pending before Judge Oliver to which AMPI is a defendant.[3] Without giving AMPI notice and an opportunity to be heard, Chief Judge Spears granted the Government's request and directed that the grand jury subpoenas, transcripts and documents "be disclosed to the United States District Court for the Western District of Missouri for such use in pending proceedings as that Court deems appropriate." The Government attorneys also took it upon themselves to send Chief Judge Oliver an unsolicited letter which informed him of Chief Judge Spears' order and inaccurately stated that Chief Judge Spears had "[d]etermined that these matters may be material to proceedings pending before your court."

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[3] The Government's "Statement with Respect to the Recommendations of the 75-2 Grand Jury That Grand Jury Transcripts and Documents Be Made Available to Other Courts," which initiated the independent transfer proceeding, is reprinted in Appendix 3.

AMPI found out about these *ex parte* proceedings through a report in a newspaper of general circulation and thereafter filed motions requesting reconsideration of the transfer order, return of AMPI's documents and expungement of the grand jury transcript. Pursuant to these motions, Chief Judge Spears stayed transfer of any grand jury materials and ordered a hearing on October 1, 1976 concerning their disposition.

At the October 1, 1976 hearing, Chief Judge Spears explicitly found that the requisite showing of a particularized and compelling need for the production of the grand jury materials had not been made.[4] Nevertheless, on that same day, Chief Judge Spears ordered that an inventory of the grand jury materials be transferred to Chief Judge Oliver of the Western District of Missouri and provided that upon a certification of compelling need by Chief Judge Oliver, the Clerk for the Western District of Texas would forward the requested grand jury materials. The appealability of this order, which finally determined the only issue pending in the Western District of Texas by ordering the disclosure of the secret grand jury materials to Judge Oliver, is one of the issues presented by this petition.

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[4] *See* "Order Modifying Order of August 25, 1976," reprinted in Appendix 2; RI. 155, reprinted in Appendix 3 ("I have seen no indication that there is anything in those [grand jury] files that would be material or relevant. I have seen nothing that would indicate that it couldn't have been, if it hadn't already been, disclosed otherwise through the discovery procedures, nor have I seen anything showing a particularized or compelling need for any particular document or any particular transcript. There is no indication that I have been able to find in the record that any witness testified contrary to what he tesified to before the grand jury. . . .").

At this same October 1, 1976 hearing, the National Farmers' Organization ("NFO"), a counterclaim plaintiff against AMPI in the private antitrust litigation pending in the Western District of Missouri, sought to intervene as of right in the transfer proceeding pursuant to Fed. R. Civ. P. 24(a)(2), and attached to its motion a Rule 6(e) motion which had first been filed in the Western District of Missouri. AMPI opposed this motion on the grounds that NFO had established neither that it had an interest in the proceeding cognizable under Rule 24(a)(2) nor that its alleged interest was not being adequately represented by the Government. On November 4, 1976, Chief Judge Spears issued an order granting NFO's motion to intervene. This is the last order from which AMPI has appealed. It is final since the only act left in the Western District of Texas, upon Chief Judge Oliver's certification, is the ministerial act of sending the grand jury materials to the Western District of Missouri.

On October 8, 1976, AMPI filed a timely Notice of Appeal which was amended on October 18 and November 22, 1976, to include appeal of all four orders in issue. On November 5, 1976, Chief Judge Spears denied AMPI's motion for a stay pending appeal; however, on November 28, 1976, the United States Court of Appeals for the Fifth Circuit granted a stay.[5]

[5] By the time the Court of Appeals granted a stay pending appeal, what purported to be the inventory provided for in Judge Spears' October 1, 1976 Order was transferred to the Western District of Missouri. It appears that what was transferred had been at least in part prepared by Antitrust Division attorneys, contrary to the Order of Judge Spears which provides that the Clerk of Court prepare the inventory. What was sent to the Western District of Missouri contains marginal notes and comments which may have involved a breach of grand jury secrecy. *See* "AMPI's Motion to Determine Compliance with the Court's Order of October 1, 1976 and For Appropriate Relief," Supporting Memorandum, and Affidavit of Sidney Harris, Esq., RI. 245-56, reprinted in Appendix 3. When AMPI discovered these facts it requested an evidentiary hearing before Judge Spears to determine whether his Order had been complied with, and whether government attorneys had breached grand jury secrecy. Judge Spears stayed all proceedings pending the resolution of the appeals which had by that time been noticed.

On February 6, 1978, the United States Court of Appeals for the Fifth Circuit issued its opinion holding that the four orders which AMPI had appealed were not final orders appealable pursuant to 28 U.S.C. § 1291 (1970), and therefore dismissed the appeal. AMPI filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on March 3, 1978.

REASONS FOR GRANTING THE WRIT

1. Introduction

This case presents the important but unsettled issues of (1) whether orders denying relief from alleged unauthorized and improper conduct of a federal grand jury investigation are appealable as final decisions under 28 U.S.C. § 1291 (1970) after the termination of the grand jury investigation where no indictment or government investigation is pending; and (2) whether orders transferring secret grand jury materials to another district for use in unrelated private litigation are appealable as final decisions under 28 U.S.C. § 1291 (1970) after all proceedings in the transferor district have been completed, save the ministerial act of the clerk actually transferring the secret materials. The decision below, holding that such orders are not appealable, is a clear departure from this Court's "practical finality" approach to the final judg-

ment rule first enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949), and expanded upon in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54 (1964), and *Abney* v. *United States*, —— U.S. ——, 97 S. Ct. 2034, 2039-42 (1977), since the Fifth Circuit's decision has the practical effect of forever denying AMPI an opportunity to obtain meaningful review of these orders. Moreover, the Fifth Circuit's decision is in direct conflict with numerous decisions of other United States Courts of Appeals, and with a prior Fifth Circuit decision, which apparently still stands as precedent.

At stake in this case are the continued vitality of two of the most fundamental principles of our American legal system—the grand jury institution as a check on prosecutorial overzealousness [6] and the secrecy of grand jury proceedings.[7] If the decision of the Fifth Circuit is not reviewed by this Court, AMPI will be forever denied an opportunity to obtain meaningful review of and relief from the orders in issue.

Since the grand jury investigation took place in the Western District of Texas under the supervision of Chief Judge Spears, the Western District of Missouri and the Eighth Circuit can not give AMPI effective relief. Those Courts can not order return of AMPI's documents or order expungement of the grand jury record. If AMPI is right in its contentions of lack of authorization and improper motivation

[6] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343 (1974); United States v. Dionisio, 410 U.S. 1, 17 (1973).

[7] *See, e.g.*, Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399-400 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); United States v. Johnson, 319 U.S. 503, 513 (1943).

then the relief requested is merited since one of the important policies behind grand jury secrecy is the avoidance of public disclosure of normally confidential information. *See Petrol Stops Northwest* v. *United States*, 1978-1 Trade Cas. ¶ 61,935, at 73,955 (9th Cir. 1978). Once the grand jury materials have been transferred to Chief Judge Oliver, it will be impossible to return AMPI to the same position it would have been if the allegedly unauthorized and improperly motivated grand jury investigation had not taken place, or had not been permitted to go forward, since disclosure of these materials to Chief Judge Oliver constitutes an irreparable breach of grand jury secrecy. *See In the Matter of Grand Jury Investigation of the Banana Industry*, 214 F. Supp. 856, 859 (D. Md. 1963). This would be unconscionable in view of the explicit finding by Chief Judge Spears, who is responsible for safeguarding the secrecy of these grand jury materials, that no showing of particularized or compelling need for these materials has been made. *See United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958).

For these reasons it is of vital importance that the writ be granted so that this Court may review the decision below.

2. The Decision Below Contravenes This Court's Rule of Practical Finality for Determining Appealability Under 28 U.S.C. § 1291 (1970).

The decision below flies in the face of the practical finality approach to the final judgment rule developed by this Court in a number of decisions. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), this Court, declaring that the final judgment

rule was to be given "a practical rather than a technical construction," held that an order denying the defendant's motion to require the plaintiff to post security for the costs of litigation pursuant to a state statute was immediately appealable because to deny appeal at that time would foreclose any effective means of later appellate review and would result in a permanent loss of the important right being asserted by the defendant.

In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54 (1964), this Court expanded the *Cohen* practical finality rule to permit an immediate appeal from the District Court's dismissal of claims under a state wrongful death statute by a deceased seaman's mother, brother and sisters, and under the federal Jones Act by the brother and sisters, even though the District Court order left standing the mother's Jones Act claim. While the District Court's order was thus clearly not the final decision in the proceeding and would *not* have irreparably denied the brother and sisters an opportunity to seek relief, this Court applied a balancing test—weighing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other"—and held that the probable delay of several years in determining the brother and sisters' claims would work an injustice which outweighed the costs of piecemeal review. Applying such a balancing test to the facts of the instant case mandates appealability since Chief Judge Spears' orders relate to the grand jury and transfer proceedings, both of which now have been completed, and since the important rights asserted by AMPI will be forever lost if an appeal is not allowed at this time. The Fifth Circuit admitted

that this case was "one of those cases falling within 'the twilight zone of finality'," Opinion at 2023, but failed to heed the clear mandate of *Gillespie* that such "twilight zone" cases are to be decided in favor of appealability. 337 U.S. at 542.

This Court's most recent decision regarding the final judgment rule, *Abney* v. *United States,* —— U.S. ——, 97 S. Ct. 2034 (1977), was totally ignored by the Fifth Circuit. In *Abney,* this Court held that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision for the purposes of 28 U.S.C. § 1291 (1970). The Court recognized that the defendant would be able to obtain complete review of his double jeopardy assertion on appeal from a conviction, but held that this would be inadequate since the holding of a second trial in itself would deprive the defendant of rights which the double jeopardy clause was intended to protect, making later review inadequate. Review in the instant case is even more compelling than it was in *Abney* since the double jeopardy ruling could have been reviewed after conviction whereas neither Chief Judge Oliver nor the U.S. Court of Appeals for the Eighth Circuit will have authority to grant AMPI's requested relief.

On numerous other occasions this Court has applied the teachings of these cases and not allowed the final judgment rule to be applied so as to prevent a party from obtaining any meaningful review of an order. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 171-72 (1974); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306, 309 (1962); *Stack* v. *Boyle,* 342 U.S. 1, 6 (1951); *Roberts* v. *United States District Court for*

the Northern District of California, 339 U.S. 844 (1950); *Swift & Co. Packers* v. *Compania Colombiana del Caribe,* 339 U.S. 684, 688-89 (1950).[8] *In Perlman* v. *United States,* 247 U.S. 7, 12-13 (1918), the denial of a motion to restrain the United States Attorney from taking possession of the petitioner's documents which were under the control of a court clerk and presenting them to a grand jury investigating the petitioner was held appealable in recognition of the fact that possible review of the issues presented by the motion in connection with future proceedings against the petitioner would not provide an effective remedy.

Since the Fifth Circuit paid no heed to these decisions, AMPI will be forever denied an opportunity to obtain meaningful review of the orders in issue unless this Court reviews the decision below. AMPI has challenged the alleged unauthorized and improper use of the grand jury from the outset of the investigation. Once the grand jury materials are transferred to the Western District of Missouri it will be impossible to return AMPI to the same position it would have been in if the investigation had not taken place. Thus, even if the Fifth Circuit's assertion that AMPI may raise these issues before Chief Judge Oliver was correct, which it is not, this Court's rule of practical finality mandates review of these issues at this time.

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[8] *See also* Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 (1948) (an order is appealable where the "controversy had proceeded to a point where the losing party would be irreparably injured if review were unavailing"); Cobbledick v. United States, 309 U.S. 323, 329 (1940) ("Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes").

The assertion that Judge Oliver can review these issues is unquestionably wrong since the responsibility for supervision over a grand jury resides in the district where the grand jury sits. *See, e.g., State of Illinois* v. *Sarbaugh,* 552 F.2d 768, 772-73 (7th Cir.), *cert. denied,* 46 U.S.L.W. 3238 (1977); *Gibson* v. *United States,* 403 F.2d 166, 167-68 (D.C. Cir. 1968). Likewise, in respect to the transfer order, the responsibility for safeguarding the secrecy of the grand jury materials resides with Judge Spears. *See State of Illinois* v. *Sarbaugh,* 552 F.2d 768, 772-73 (7th Cir.), *cert. denied,* 46 U.S.L.W. 3238 (1977). The Western District of Texas is best situated to evaluate the need for continuing secrecy of the grand jury materials and is probably the only court with jurisdiction under Fed. R. Crim. P. 6(e). *See Petrol Stops Northwest* v. *United States,* 1978-1 Trade Cas. ¶ 61,935, at 73,957 n.4 (9th Cir. 1978). Transfer to Judge Oliver will constitute an irreparable breach of grand jury secrecy without the requisite showing of a particularized or compelling need for these materials. *See In the Matter of Grand Jury Investigation of the Banana Industry,* 214 F. Supp. 856, 859 (D.Md. 1963).

Since the responsibility for deciding the issues raised by AMPI resides in the District Court for the Western District of Texas, since only that court can grant AMPI adequate relief from the improprieties alleged, and since that court has made a final determination on all the issues raised, the challenged orders are clearly appealable under this Court's construction of the final judgment rule. The decision below is such a striking departure from this Court's holdings, and the harm to AMPI will be so great if the decision below is allowed to stand, that the writ should be granted.

3. The Substantial Conflicts Between the Decision Below and Decisions by Other Circuit Courts of Appeals Requires Supreme Court Review of the Issues Presented.

The conflicts between the decision below and holdings by other Courts of Appeals are so numerous and so serious that there is a compelling need for review by this Court.

The Fifth Circuit's holding that the orders denying AMPI's requested relief from the alleged unauthorized and improper use of the grand jury investigation are not appealable lacks all logic since the grand jury investigation has been terminated with no prosecution being brought or contemplated, and it is in conflict with numerous decisions by other Circuit Courts of Appeals. The First Circuit, in *United States* v. *Doe,* 455 F.2d 1270, 1273-74 (1st Cir. 1972), held that the denial of a protective order against alleged misuse of a grand jury, for the purpose of collecting evidence to be used in a proceeding in another district, was appealable since there would not be an effective opportunity for the petitioner to obtain review of his claim of grand jury misuse in the other proceeding. In the instant case there are *no* pending Government proceedings in which AMPI may raise its claims.

Since AMPI is now seeking the return of its documents and expungement of the grand jury record—the only remedy which will place AMPI in the same position as if the allegedly unauthorized and improperly motivated grand jury investigation had never taken place—the Fifth Circuit decision is also in direct conflict with *Socony Mobil Oil Co.* v. *United States,* 275 F.2d 227, 229 (7th Cir. 1960), in which the Seventh Circuit held that an order denying a motion for the return of documents supplied pursuant to a grand

jury subpoena would be appealable if the order was in a proceeding independent of any pending criminal action resulting from the grand jury investigation. Clearly there is no pending criminal action resulting from the grand jury investigation.

Closely analagous are the numerous decisions by this Court as well as various Circuit Courts of Appeals holding that the denial of a motion for the return of seized property and suppression of records is immediately appealable when the suppression proceeding is independent of other proceedings. *See, e.g., United States* v. *Ryan,* 402 U.S. 530, 533 (1971); *DiBella* v. *United States,* 369 U.S. 121, 131-32 (1962); *Carroll* v. *United States,* 354 U.S. 394, 403-04 (1957); *VonderAhe* v. *Howland,* 508 F.2d 364, 368 (9th Cir. 1974); *United States* v. *Williams,* 459 F.2d 909, 910 (6th Cir. 1972); *United States* v. *Alexander,* 428 F.2d 1169, 1171 (8th Cir. 1970); *United States* v. *Fields,* 425 F.2d 883, 886 (3d Cir. 1970); *Selinger* v. *Bigler,* 377 F.2d 542 (9th Cir.), *cert. denied,* 389 U.S. 904 (1967); *Goodman* v. *United States,* 369 F.2d 166, 167-68 (9th Cir. 1966).

The Fifth Circuit's decision that the transfer order is not appealable at this time is in direct conflict with decisions by at least two other Circuits. The Seventh Circuit in *State of Illinois* v. *Sarbaugh,* 552 F.2d 768, 773-74 (7th Cir.), *cert. denied,* 46 U.S.L.W. 3238 (1977), held an order denying a motion for production of grand jury materials but transferring them to another district for possible use in private antitrust litigation to be appealable, in a factual situation virtually identical to that in the instant case. The Fifth Circuit's decision is also in direct conflict with the District of Columbia Circuit's holding in *Gibson*

v. *United States,* 403 F.2d 166, 167 (D.C. Cir. 1968), that the denial of a motion for access to grand jury testimony for use in a case pending before another court was an appealable order since it disposed of all proceedings in the court having control over the grand jury transcript. Surprisingly, the decision below is also in direct conflict with an earlier Fifth Circuit decision which that court apparently continues to consider valid. In *United States* v. *Byoir,* 147 F.2d 336 (5th Cir. 1945), that court held that an order granting access to grand jury transcripts and documents for use in a proceeding in another district was appealable, notwithstanding proceedings pending in two districts.[9]

Since the Government's sole purpose in initiating the transfer proceeding was to effect a disclosure of the grand jury materials to the private plaintiffs in the proceeding now pending in the Western District of Missouri, the transfer proceeding is closely analogous to an independent discovery proceeding.[10] Orders granting or denying discovery in such proceedings have been repeatedly held appealable. *See, e.g., Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964); *Cobbledick*

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[9] In the decision below, the Fifth Circuit incorrectly distinguished *Byoir,* Opinion at 2025 n.11, but in no way indicated that *Byoir* did not continue to have precedential effect in the Fifth Circuit.

[10] "When the [grand jury] minutes are sought for use in other proceedings the Rule 6(e) motion is usually regarded as an independent proceeding for discovery, with the result that an order granting or denying access is appealable." 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 110.13 [11], at 193 (1975) (citing, *inter alia, Byoir* and *Gibson,* and *Sarbaugh* in the Supplement).

v. *United States,* 309 U.S. 323, 329-30 (1940); *Sheehan* v. *Doyle,* 513 F.2d 895, 898 (1st Cir.), *cert. denied,* 423 U.S. 874 (1975); *Jones* v. *Superintendent, Virginia State Farm,* 460 F.2d 150, 152 (4th Cir. 1972), *cert. denied,* 410 U.S. 944 (1973); *Ochsner* v. *Millis,* 382 F.2d 618 (6th Cir. 1967); *Natta* v. *Zletz,* 379 F.2d 615, 618 (7th Cir. 1967). The Fifth Circuit's decision that the transfer order is not appealable is in conflict with these and numerous similar holdings.

The issue of whether an order granting intervention pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure is appealable at the conclusion of the proceeding has apparently never been directly confronted by this Court or the Circuit Courts of Appeals, probably due to the obviousness of the answer. However, decisions by this Court and various Courts of Appeals holding that such orders are not appealable in the midst of the proceedings clearly indicate that intervention orders may be appealed when all proceedings before the trial court have been completed. *See Deckert* v. *Independence Shares Corp.,* 311 U.S. 282, 290-91 (1940); *In re Estelle,* 516 F.2d 480, 484 (5th Cir. 1975), *cert. denied,* 426 U.S. 925 (1976); *Roach* v. *Churchman,* 457 F.2d 1101, 1105 (8th Cir. 1972); *Kris Petroleum, Ltd.* v. *Stoddard,* 221 F.2d 801, 802 (9th Cir. 1955). The Fifth Circuit's decision that an order granting intervention is not appealable after all proceedings in the trial court have been completed is in conflict with those decisions and lacks all indicia of fairness or logic.

CONCLUSION

The conflicts between the decision below and the holdings of this Court and other Courts of Appeals are so numerous and serious, and the underlying issues—alleged unauthorized and improper use of the grand jury process, and an unjustifiable breach of grand jury secrecy—are so important, there is a vital need for review of the Fifth Circuit's decision by this Court. The writ should therefore be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

In re 1975-2 GRAND JURY INVESTIGATION OF ASSOCIATED MILK PRODUCERS, INC.

Appeal of ASSOCIATED MILK PRODUCERS, INC.

No. 76-4094.

Decision and Judgment of the United States Court of Appeals for the Fifth Circuit

Feb. 6, 1978.

. . . . . .

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH, SIMPSON and MORGAN, *Circuit Judges.*

AINSWORTH, *Circuit Judge*:

Associated Milk Producers, Inc. ("AMPI") appeals from four orders by Chief Judge Adrian A. Spears of the United States District Court for the Western District of Texas. In the first order, issued February 19, 1975, the district court denied AMPI's motions to stay grand jury proceedings brought against it by the Government and to quash or modify a grand jury subpoena arising out of those proceedings. The court also denied AMPI's motions for an evidentiary hearing and for an in camera inspection of certain government documents.[1] In the second order, issued

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[1] The order of February 19 stated:

> The Court having received three motions by Associated Milk Producers, Inc. ("AMPI"), in connection with a grand jury

May 6, 1975, the district court denied reconsideration of the motion to stay the grand jury proceedings.[2] In the third order, issued October 1, 1976, the district court pursuant to Fed.R.Crim.P. 6(e), directed that an inventory of the materials compiled during the grand jury proceedings be sent to the United States District Court for the Western District of Missouri so that it could determine if a "compelling need" existed for the materials in related litigation before that court and, if so, request their trans-

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subpoena served upon it on February 10, 1975, in the above proceeding, namely:

1. Motion to Modify Subpoena;
2. Application for *In Camera* Inspection; and
3. Motion to Stay Grand Jury Proceedings; and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that:

1. The motions by AMPI are denied;
2. The subpoena is Ordered enforced and AMPI is directed to make its return thereto forthwith; and
3. Government and AMPI counsel are directed to confer forthwith to accomplish AMPI's return expeditiously with a minimum of inconvenience to movant AMPI.

[2] The order of May 6 stated:

On this the 6th day of May, 1975, the Court having fully considered movant Associated Milk Producers, Inc.'s motion for reconsideration of its motion to stay grand jury proceedings, and having received memoranda and heard argument from both movant and the United States,

IT IS HEREBY ORDERED THAT:

The motion for reconsideration of AMPI's motion to stay grand jury proceedings be DENIED, and the special attorneys for the Government be permitted to appear and conduct further grand jury proceedings in this cause.

Entered this the 6th day of May, 1975, at San Antonio, Texas.

fer.[3] In the fourth order, issued November 4, 1976, the district court, pursuant to Fed.R.Civ.P. 24(a)(2), granted the motion of The National Farmers' Organization, Inc. to

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[3] The order of October 1 stated:

On this the 1st day of October, 1976, Associated Milk Producers, Inc. (AMPI) having moved that the Court reconsider its order to transfer the grand jury subpoenas, transcripts, and documents in the above captioned matter, and the Court having received motions and memoranda, and heard arguments on this date, not only from movant, but also from The National Farmers' Organization (NFO) and the United States; and it appearing that no party to this action has shown a compelling need for disclosure of all or any particular portion of said grand jury materials; and it further appearing that said materials are exceedingly voluminous, filling no less than 55 large file boxes and one metal filing cabinet; and it further appearing that the indiscriminate transfer of all of said materials to the Western District of Missouri would be impractical, burdensome and premature, especially in view of the failure of any party to demonstrate a particularized or compelling need for disclosure, it is, therefore,

ORDERED that this Court's August 25, 1976 Order be modified in the following respects:

(1) The Clerk of this Court is directed to promptly send to Judge John W. Oliver, as transferee judge, an inventory of the grand jury subpoenas, transcripts, and the documents for his *in camera* inspection.

(2) In the event the transferee judge finds at any time that there is a compelling need for all or any part of the grand jury subpoenas, transcripts and documents, and certifies that the transfer thereof is warranted, the Clerk shall forthwith transfer the requested material to the transferee judge.

(3) Nothing set forth in this order, or stated in open court on this date, should be construed as any finding by this Court with respect to the relevancy or materiality of, or the need for, the said grand jury materials; it being the intention of this Court that all such matters shall be solely addressed to, and determined by, the transferee judge.

(4) The Court shall reserve decision on NFO's motion to intervene until AMPI has been afforded a period of ten (10)

intervene as of right in these proceedings relating to transfer of the grand jury materials.[4]

I. The Facts

The genesis of this lengthy and bitterly contested dispute between the Government and AMPI lies in an extensive government investigation of alleged monopolization in the milk industry. This investigation prompted the United States on February 1, 1972 to file a civil antitrust action against AMPI in the United States District Court for the Western District of Texas, Chief Judge Spears presiding. The Government charged AMPI with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sought injunctive relief. Fifteen private treble damage antitrust suits were also filed against AMPI in various federal courts during 1971 and 1972. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, transferred the private suits for pretrial proceedings to Chief Judge John W. Oliver of the United States District Court

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days from this date to respond thereto, and NFO has been allowed five (5) days thereafter in which to reply to said response.

(5) All provisions of this Court's order of February 21, 1975, except as they may be in conflict with this order, shall remain in full force and effect, subject to further orders of this Court.

Entered this the 1st day of October, 1976, at San Antonio, Texas.

[4] The order of November 4 stated:

On this the 4th day of November, 1976, the National Farmers' Organization (NFO) having moved the Court for permission to intervene in this proceeding and the Associated Milk Producers, Inc. (AMPI) having opposed said motion; and it appearing that NFO should be permitted to intervene under Rule 24(a), Federal Rules of Civil Procedure, it is, therefore,

Ordered that NFO's motion to intervene be Granted.

Entered this the 4th day of November, 1976.

for the Western District of Missouri. The cases were designated JPML Docket No. 83, sometimes referred to by the Government as the Midwest Milk Monopolization Litigation. On February 20, 1974, Chief Judge Spears transferred the Government's suit against AMPI to Chief Judge Oliver to coordinate discovery with that in JPML Docket No. 83. The Government's suit was not consolidated with the private actions, however.

In January of 1974 the plaintiffs (one of whom was The National Farmers' Organization, Inc.) in two of the private suits moved pursuant to Fed.R.Civ.P. 37(b), which pertains to failure to comply with a discovery order, for sanctions against AMPI for allegedly frustrating discovery by refusing to produce material documents. The United States chose not to file a similar Rule 37(b) motion, electing instead to participate only in civil discovery relating to the private plaintiffs' motions, which are still pending before Chief Judge Oliver. On August 13, 1974, the United States and AMPI filed a proposed consent decree in the Government's suit. Chief Judge Oliver approved the decree on April 30, 1975. *See United States* v. *Associated Milk Producers, Inc.*, W.D.Mo., 1975, 394 F.Supp. [illegible], *aff'd*, 8 Cir., 534 F.2d 113, *cert. denied sub nom.*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976). This settlement notwithstanding, attorneys from the Antitrust Division of the United States Department of Justice initiated the instant grand jury investigation of AMPI on February 10, 1975 in the United States District Court for the Western District of Texas. Chief Judge Spears supervised the grand jury. The Government directed its investigation to alleged obstruction of justice by AMPI in the discovery stages of the various civil antitrust suits. The Government served AMPI with a subpoena *duces tecum*, directing it to appear before the grand jury and produce thirteen different categories of documents. AMPI countered by filing motions to quash or modify the subpoena and to stay the grand jury investigation, as well as motions for an evidentiary hearing and an

in camera inspection of documents purporting to grant authority to the Antitrust Division attorneys to conduct the grand jury investigation. Chief Judge Spears denied the motions on February 19, 1975 and denied reconsideration of the motion to stay on May 6, 1975.

The grand jury was discharged on August 6, 1976. It did not return an indictment. However, in a letter to the district court, it recommended that the court retain custody of the transcripts of the grand jury proceedings and those personal records of individuals, such as tax returns and calendars, received by the grand jury. It recommended further that the business files and records of AMPI received by the gand jury "be made available to other courts pursuant to an appropriate Rule 6(e) motion."[5] The Government filed a statement indicating it had "no objection to the entry of such order as the Court deems appropriate to make the grand jury subpoenas, transcripts and documents available to Chief Judge Oliver for such use as he deems appropriate in connection with the [private plaintiffs'] Rule 37 motions and the trial of the JPML 83 cases." Accordingly, the district court on August 25, 1976 ordered that the "grand jury subpoenas, transcripts and documents . . . be disclosed to the United States District Court for the Western District of Missouri for

[5] Fed.R.Crim.P. 6(e) provides in relevant part:

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

such use in pending proceedings as that Court deems appropriate." AMPI moved the court to reconsider and it did. On October 1, 1976, Chief Judge Spears modified his order of August 25 and directed the clerk to send Chief Judge Oliver only an inventory of the grand jury materials for his in camera inspection and to forward to him any materials for which he found a "compelling need." The district court stayed its order, however, pending this appeal. Meanwhile, The National Farmers' Organization, Inc., one of the private plaintiffs in JPML Docket No. 83, moved the district court to intervene as of right in this controversy pursuant to Fed.R.Civ.P. 24(a)(2).[6] The district court granted its motion on November 4, 1976.

On appeal AMPI raises numerous objections to the district court's orders of February 19, May 6, October 1, and November 11. AMPI contends that the district court erred in issuing its first two orders because the Department of Justice initiated the grand jury investigation in bad faith "for improper purposes" and because the Assistant Attorney General in charge of the Antitrust Division was without authority to appoint attorneys to conduct a grand jury investigation relating to obstruction of justice allegations. With respect to the third order, AMPI contends that Chief Judge Spears committed numerous procedural and substantive errors of law in transferring an inventory of the grand jury materials to Chief Judge Oliver.[7] Finally,

[6] Rule 24(a)(2) provides:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[7] As relief from these three alleged erroneous orders, AMPI requests that we remand the case to the district court with directions

AMPI contends that the fourth order was erroneous because The National Farmers' Organization, Inc. is not a proper candidate for intervention under Fed.R.Civ.P.24 (a)(2).

II. The Question of Appealability

We first consider whether AMPI's appeal is properly before this Court in light of the final judgment requirement of 28 U.S.C. § 1291. Section 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

The final judgment rule has been a part of federal appellate review since the First Judiciary Act, which limited appellate review to "final judgments and decrees." Act of Sept. 24, 1789, §§ 21, 22, 25, 1 Stat. 73, 83-85. But for one temporary exception,[8] finality continued to be a prerequisite to appealability until Congress passed the Evarts Act in 1891, which provided for review of interlocutory orders "granting or continuing" injunctions. Act of March 3,

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to return AMPI's subpoenaed documents and to expunge the other grand jury materials. Alternatively, AMPI requests that we remand with directions to hold an evidentiary hearing and an in camera inspection to allow AMPI to show the Government's alleged misuse of the grand jury and the alleged absence of prosecutorial authority by the Antitrust Division attorneys.

[8] In 1875 Congres gave the Supreme Court appellate jurisdiction over orders of the federal circuit courts of appeals dismissing actions or remanding them to state courts for want of jurisdiction or for jurisdiction improperly or collusively effected. Act of March 3, 1875, § 5, 18 Stat. 470, 472. Congress repealed this grant in 1887. Act of March 3, 1887, § 6, 24 Stat. 552, 555.

1891, §7, 26 Stat. 826, 828. From that initial grant has evolved 28 U.S.C. § 1292, presently the principal statutory authority for appeals from interlocutory orders.[9] Nonetheless, the final judgment requirement continues in 28 U.S.C. § 1291 as the dominant rule of federal appellate practice. Justice Frankfurter articulated this fact in *Cobbledick* v. *United States*, 309 U.S. 323, 324-25, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate review of the component elements in a unified cause.

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[9] To be appealable a district court order must be final or it must fall into one of those specific classes of appealable interlocutory orders provided for in 28 U.S.C. § 1292. The final judgment rule is also subject to statutory exceptions that permit appeals as of right from certain interlocutory orders. *See, e. g.*, 11 U.S.C. § 47 (authorizing appeals in "proceedings in bankruptcy"); 18 U.S.C. § 1404 and 3731 (authorizing interlocutory appeals by the Government from pretrial orders suppressing evidence). Additionally, the All Writs Statute, 28 U.S.C. § 1651, can serve as a vehicle for obtaining review in appropriate cases of normally nonappealable interlocutory orders.

See, e. g., Di Bella v. *United States*, 369 U.S. 121, 126, 82 S.Ct. 654, 658, 7 L.Ed.2d 614 (1962); *Diamond Shamrock Oil & Gas Corp.* v. *Comm'r of Rev.*, 8 Cir., 1970, 422 F.2d 532, 534; J. Moore, B. Ward & J. Lucas, 9 *Moore's Federal Practice* ¶ 110.06 at 105-07 (1975); Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 *Colum. L.Rev.* 89 (1975); Note, *The Finality and Appealability of Interlocutory Orders—A Structural Reform Toward Redefinition*, 7 *Suffolk U.L.Rev.* 1037, 1039 (1973). *See also Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180-82, 75 S.Ct. 249, 252-53, 99 L.Ed. 233 (1955).

Predictably, the determination of what constitutes a final judgment has been no easy task. Justice Black once stated that "final" in the context of appealability is an "abstruse and infinitely uncertain term." *Will* v. *United States*, 389 U.S. 90, 108, 88 S.Ct. 269, 280, 19 L.Ed.2d 305 (1967) (Black, J., concurring). *See McGourkey* v. *Toledo & Ohio Central Railway Co.*, 146 U.S. 536, 544-45, 13 S.Ct. 170, 172, 36 L.Ed. 1079 (1892). Three Supreme Court decisions in particular, however, provide a framework in which to contend with the problem of defining "final judgment."

In *Cobbledick* v. *United States, supra*, the Court held that a district court order denying motions to quash subpoenas *duces tecum* directing three witnesses to appear before the grand jury was not an appealable final judgment. The Court established a stringent standard of finality, one that seemingly encompassed an entire case including collateral parties and issues. Regarding finality as "the means for achieving a healthy legal system," Justice Frankfurter, writing for a unanimous Court, stated that "[n]either a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation. . . .'" 309 U.S. at 326, 60 S.Ct. at 541-42, *quoting Segurola* v. *United States*, 275 U.S. 106, 112, 48 S.Ct. 77, 79, 72 L.Ed. 186 (1927).

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), created an exception to the finality standard of *Cobbledick*. In *Cohen* the district court refused to apply a state statute requiring the plaintiff in a stockholder's derivative action to make a security deposit as a condition of proceeding with the suit.[10] The Court found this to be an appealable final judgment. First, however, Justice Jackson articulated the Court's continued support of the final judgment rule:

> The effect of [28 U.S.C. § 1291] is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.

337 U.S. at 546, 69 S.Ct. at 1225. In this case the district court order was held to be appealable because it fell

> in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

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[10] The purpose of the statute was to make a plaintiff liable for all expenses and attorneys' fees of the corporate defendants if the plaintiff failed to make good his or her complaint and to entitle the defendants to indemnity before the suit could go forward.

337 U.S. at 546, 69 S.Ct. at 1225-26. Moreover, the district court order presented "a serious and unsettled question," 337 U.S. at 547, 69 S.Ct. at 1226, which, if reviewed upon final disposition of the merits of the case, would work a serious hardship on the plaintiff:

> When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.

337 U.S. at 546, 69 S.Ct. at 1225. Finally, as if concerned that its deceptively simple finality test might become a mere talisman, the Court emphasized that, as in *Cohen,* section 1291 is to be given a "practical rather than a technical construction." 337 U.S. at 546, 69 S.Ct. at 1226, *citing Cobbledick* v. *United States, supra,* 309 U.S. at 328, 60 S.Ct. at 542, *United States* v. *River Rouge Improvement Co.,* 269 U.S. 411, 414, 46 S.Ct. 144, 145, 70 L.Ed. 339 (1926), *Bank of Columbia* v. *Sweeney,* 26 U.S. (1 Pet.) 567, 569, 7 L.Ed. 265 (1828).

This "practical" approach to finality was the touchstone of the Court's most recent definitive statement on the final judgment rule. In *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964), the Court carved out another exception to the rule in holding to be final a district court order providing that the Jones Act supplied the exclusive remedy in plaintiff's wrongful death action. Justice Black stated:

> [A] decision "final" within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case. . . . And our cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise

> a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction."

379 U.S. at 152, 85 S.Ct. at 311, *citing Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 545, 546, 69 S.Ct. at 1225, 1226. The Court emphasized further that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand the the danger of denying justice by delay on the other.'" 379 U.S. at 152-53, 85 S.Ct. at 311, *quoting Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950). In this marginal case of finality, the scales tipped in favor of review and against the usual result of nonappealability only because the questions presented were "'fundamental to the further conduct of the case.'" 379 U.S. at 153, 85 S.Ct. at 311, *quoting United States v. General Motors Corp.,* 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945).

Using the framework provided by *Cobbledick, Cohen,* and *Gillespie* as our benchmark, we find that the district court orders of February 19, May 6, and October 1 are not final within the meaning of 28 U.S.C. § 1291. Accordingly, the appeal of these orders must be dismissed. This is, to be sure, one of those cases falling within "the 'twilight zone' of finality." However, the decisions of the Supreme Court and the lower courts' applications of those decisions indicate to us that the final judgment rule is still to be construed narrowly. Like most rules, it is subject to exceptions, as *Cohen* and *Gillespie* demonstrate. The flexibility provided by these exceptions is a necessary ingredient of just decisions. *See, e.g., Litton Systems, Inc. v. Southwestern Bell Telephone Co.,* 5 Cir., 1976, 539 F.2d 418, 425-26. But

if the rule is not to be emasculated, its exceptions must be carefully drawn and sparingly applied.

The district court's orders of February 19 and May 6 denying AMPI's motions to quash or modify the grand jury subpoena and to stay the grand jury investigation pending an evidentiary hearing and an in camera inspection, though "fully consummated decisions," are "but steps toward final judgment." The orders address questions which still remain "open, unfinished [and] inconclusive." *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546, 69 S.Ct. at 1225. The issues raised by AMPI, which are inextricably linked to the pending private treble damage antitrust actions known as JPML Docket No. 83, have not yet been finally resolved by the district courts involved in this matter. It is true, of course, that Chief Judge Spears has ruled with respect to AMPI's contentions. But Chief Judge Oliver has not. Should disclosure of the grand jury materials be authorized in the JPML Docket No. 83 pretrial proceedings, AMPI will have yet another opportunity to raise its contentions before Chief Judge Oliver. With such an effective mode of review still available to AMPI, and therefore such a significant distance in the road toward final judgment yet untravelled, this Court is reluctant to intervene now, particularly in light of the importance of AMPI's contentions in litigation pending in another more interested circuit. *Cf. Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.,* 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952).

Additionally, in arguing that we should hear its appeal, AMPI has not demonstrated that later review will prejudice any of its rights, irreparably or otherwise. *See Barfield v. Weinberger,* 5 Cir., 1973, 485 F.2d 696; *21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System,* 5 Cir., 1968, 404 F.2d 31, 33. *See generally United States v. Wood,* 5 Cir., 1961, 295 F.2d 772, 777-78, *cert. denied,* 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962). Unlike

the plaintiff in *Cohen,* it has failed to show satisfactorily that its appeal falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546, 69 S.Ct. at 1225-26. *See, e. g., Blackie v. Barrack,* 9 Cir., 1975, 524 F.2d 891, 895-900, *cert. denied,* 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976); *Barfield v. Weinberger, supra; Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.,* 2 Cir., 1972, 455 F.2d 770; *21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System, supra. See generally Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 169-72, 94 S.Ct. 2140, 2148-50, 40 L.Ed.2d 732 (1974); *Litton Systems, Inc. v. Southwestern Bell Telephone Co., supra,* 539 F.2d at 425-27; *Diaz v. Southern Drilling Corp.,* 5 Cir., 427 F.2d 1118, 1122-23, *cert. denied sub nom.,* 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970). Similarly, unlike the plaintiff in *Gillespie,* AMPI has failed to demonstrate that the questions presented by its appeal of these orders, even from a "practical" perspective, are " 'fundamental to the further conduct of the case,' " or, even from the same pragmatic perspective, that "the danger of denying justice by delay" in this case outweighs "the inconvenience and costs of piecemeal review." *Gillespie v. United States Steel Corp., supra,* 379 U.S. at 152-53, 85 S.Ct. at 311. *See, e. g., Kohn v. Royall, Koegel & Wells,* 2 Cir., 1974, 496 F.2d 1094; *New England Power Co. v. Asiatic Petroleum Corp.,* 1 Cir., 1972, 456 F.2d 183; *Clark v. Kraftco Corp.,* 2 Cir., 1971, 447 F.2d 933. *See generally Hines v. D'Artois,* 5 Cir., 1976, 531 F.2d 726, 730; *Jetco Electronics Industries, Inc. v. Gardiner,* 5 Cir., 1973, 473 F.2d 1228, 1231; *Fox v. City of West Palm Beach,* 5 Cir., 1967, 383 F.2d 189, 193-94.

The order of October 1 is not appealable at this time for many of the same reasons. In the October 1 order, Chief

Judge Spears, pursuant to Fed.R.Civ.P. 6(e), directed that the clerk of court send an inventory of the grand jury materials to Chief Judge Oliver for his in camera inspection. Then,

> [i]n the event the transferee judge [Chief Judge Oliver] finds at any time that there is a compelling need for all or any part of the said grand jury subpoenas, transcripts and documents, and certifies that the transfer thereof is warranted, the Clerk shall forthwith transfer the requested material to the transferee judge.

Chief Judge Spears was careful to indicate in his order that he was not passing on the question of disclosure of the grand jury materials:

> Nothing set forth in this order, or stated in open court on this date, should be construed as any finding by this Court with respect to the relevancy or materiality of, or the need for, the said grand jury materials, it being the intention of this Court that all such matters shall be solely addressed to, and determined by, the transferee judge.

It is thus apparent that the district court order of October 1 was no more than a decision to permit Chief Judge Oliver to decide whether the materials should be disclosed in JPML Docket No. 83. This is precisely the type of "tentative, informal [and] incomplete" interlocutory decision that Congress in passing section 1291 intended to preclude from immediate review. *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546, 69 S.Ct. at 1225. *See Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. at 171, 94 S.Ct. at 2149. It is not now apparent whether any, all, or none of the grand jury materials at issue in this case will be disclosed in JPML Docket No. 83. No one has yet been aggrieved and no one will become aggrieved until Chief Judge

Oliver acts. Until then there is no appealable final order.[11] Additionally, as in the case of its appeal from the February 19 and May 6 orders, AMPI has failed to demonstrate satisfactorily how its position comes within the ambit of *Cohen* and *Gillespie. See* the cases cited on page 2024 *supra.* Accordingly, review is not proper at this time.

Finally, we reach the question of whether the order of November 4, which granted the motion of The National Farmers' Organization, Inc. to intervene as of right pursuant to Fed.R.Civ.P. 24(a)(2), is appealable. It is well settled that "[a]n order allowing intervention is interlocutory and may not be appealed immediately." *In re Estelle,* 5 Cir., 1975, 516 F.2d 480, 484, *cert. denied,* 426 U.S. 925, 96 S.Ct. 2637, 44 L.Ed.2d 380 (1976). We therefore cannot entertain the appeal of this order.

Accordingly, AMPI's appeal of the district court orders of February 19, May 6, Ocotber 1, and November 4 is dismissed.

DISMISSED.

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[11] AMPI relies on recently decided *State of Illinois v. Sarbaugh,* 7 Cir., 1977, 552 F.2d 768, as support for its position that the October 1 order is appealable. *Sarbaugh* is remarkably similar to this case on its facts and issues with one critical exception. The order held appealable by the Seventh Circuit in that case was an order "holding that the requisite particularized showing of compelling necessity had not been made." 552 F.2d at 771. In this case Chief Judge Oliver has not yet even had the opportunity to reach the question of compelling need. For the same reason, *In re Biaggi,* 2 Cir., 1973, 478 F.2d 489, *Gibson v. United States,* 1968, 131 U.S. App.D.C. 143, 403 F.2d 166, and *United States v. Byoir,* 5 Cir., 1945, 147 F.2d 336, are also inapposite to this case.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(Caption Omitted in Printing)

Before AINSWORTH, SIMPSON and MORGAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed;

It is further ordered that appellant pay to appellees, the costs on appeal to be taxed by the Clerk of this Court.

February 6, 1978

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

March 3, 1978

EDWARD W. WADSWORTH
CLERK

TO ALL PARTIES LISTED BELOW:

No. 76-4094—In re: 1975-2 Grand Jury Investigation of Associate Milk Producers, Inc.

ASSOCIATED MILK PRODUCERS, INC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

/s/ By BRENDA M. HAUCK
Deputy Clerk

*on behalf of appellant, Associated Milk Producers, Inc.,
bmh

APPENDIX 2

Orders of the United States District Court for the Western District of Texas

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Criminal Action No. SA75CR32

In re: FEBRUARY 1975 GRAND JURY INVESTIGATION

Order

(Filed February 19, 1975)

The Court having received three motions by Associated Milk Producers, Inc. ("AMPI"), in connection with a grand jury subpoena served upon it on February 10, 1975, in the above proceeding, namely:

1. Motion to Modify Subpoena;
2. Application for *In Camera* Inspection; and
3. Motion to Stay Grand Jury Proceedings; and the

Court being fully advised in the premises,

IT IS HEREBY ORDERED that:

1. The motions by AMPI are denied;
2. The subpoena is Ordered enforced and AMPI is directed to make its return thereto forthwith; and
3. Government and AMPI counsel are directed to confer forthwith to accomplish AMPI's return expeditiously with a minimum of inconvenience to movant AMPI.

ORDERED this 19th day of February 1975, at San Antonio, Texas.

/s/ ADRIAN A. SPEARS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

Order

(Filed May 6, 1975)

On this the 6th day of May, 1975, the Court having fully considered movant Associated Milk Producers, Inc.'s motion for reconsideration of its motion to stay grand jury proceedings, and having received memoranda and heard argument from both movant and the United Staes,

IT IS HEREBY ORDERED THAT:

The motion for reconsideration of AMPI's motion to stay grand jury proceedings be DENIED, and the special attorneys for the Government be permitted to appear and conduct further grand jury proceedings in this cause.

Entered this the 6th day of May, 1975, at San Antonio, Texas.

/s/ ADRIAN A. SPEARS

Adrian A. Spears
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

Order Modifying Order of August 25, 1976

(filed October 1, 1976)

On this the 1st day of October, 1976, Associated Milk Producers, Inc. (AMPI) having moved that the Court reconsider its order to transfer the grand jury subpoenas, transcripts, and documents in the above captioned matter; and the Court having received motions and memoranda, and heard arguments on this date, not only from movant, but also from The National Farmers' Organization (NFO) and the United States; and it appearing that no party to this action has shown a compelling need for disclosure of all or any particular portion of said grand jury materials; and it further appearing that said materials are exceedingly voluminous, filing no less than 55 large file boxes and one metal filing cabinet; and it further appearing that the indiscriminate transfer of all of said materials to the Western District of Missouri would be impractical, burdensome and premature, especially in view of the failure of any party to demonstrate a particularized or compelling need for disclosure; it is, therefore,

ORDERED that this Court's August 25, 1976 Order be modified in the following respects:

(1) The Clerk of this Court is directed to promptly send to Judge John W. Oliver, as transferee judge, an inventory of the grand jury subpoenas, transcripts, and documents for his *in camera* inspection.

(2) In the event the transferee judge finds at any time that there is a compelling need for all or any part of the said grand jury subpoenas, transcripts and documents,

and certifies that the transfer thereof is warranted, the Clerk shall forthwith transfer the requested material to the transferee judge.

(3) Nothing set forth in this order, or stated in open court on this date, should be construed as any finding by this Court with respect to the relevancy or materiality of, or the need for, the said grand jury materials; it being the intention of this Court that all such matters shall be solely addressed to, and determined by, the transferee judge.

(4) The Court shall reserve decision on NFO's motion to intervene until AMPI has been afforded a period of ten (10) days from this date to respond thereto, and NFO has been allowed five (5) days thereafter in which to reply to said response.

(5) All provisions of this Court's order of February 21, 1975, except as they may be in conflict with this order, shall remain in full force and effect, subject to further orders of this Court.

Entered this the 1st day of October, 1976, at San Antonio, Texas.

/s/ ADRIAN A. SPEARS

Adrian A. Spears
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

Order

(filed November 4, 1976)

On this the 4th day of November, 1976, the National Farmers' Organization (NFO) having moved the Court for permission to intervene in this proceeding and the Associated Milk Producers, Inc. (AMPI) having opposed said motion; and it appearing that NFO should be permitted to intervene under Rule 24(a), Federal Rules of Civil Procedure, it is, therefore,

ORDERED that NFO's motion to intervene be GRANTED. Entered this the 4th day of November, 1976.

/s/ ADRIAN A. SPEARS

Adrian A. Spears
United States District Judge

APPENDIX 3

Excerpts from the District Court Record

Grand Jury Recommendations for Disposition of Transcripts, Files and Records (RI. 1)

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

WESTERN DISTRICT OF TEXAS
655 E. DURANGO BLVD.
HEMISFAIR PLAZA
SAN ANTONIO, TEXAS 78206

August 6, 1976

Honorable Adrian A. Spears
Chief Judge
United States District Court
Western District of Texas
San Antonio, Texas

Re: Transcripts, Files and Records of
Associated Milk Producers, Inc.
Investigation Before the 75-2 Grand Jury

Dear Judge Spears:

Recommendations of the 75-2 Grand Jury to you regarding the above-referenced investigation are:

1. That the transcripts developed by this Grand Jury in this investigation be retained in the custody of the Court.
2. That the personal records of individuals, such as IRS tax returns and calendars, received by the Grand Jury in this investigation be retained in the custody of the Court.

3. That the business files and records of Associated Milk Producers, Inc. received by the Grand Jury be made available to other courts pursuant to an appropriate Rule 6(e) motion.

Respectfully submitted,

/s/ CHARLES E. KIMMELL
Charles E. Kimmell
Foreman, 75-2 Grand Jury

Order of Chief Judge Spears Partially Granting Grand Jury's Request (RI. 2)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE THE 75-2 GRAND JURY

Order

(Filed August 6, 1975)

The Court having considered the request of the Grand Jury, filed by letter on August 6, 1976,

It is hereby ORDERED that the Clerk of the Court retain custody of all files and records obtained in the subject investigation consistent with Requests Number 1 and 2 of the Grand Jury's letter dated August 6, 1976, a copy of which is attached hereto and made a part of this Order.

Entered this 6th day of August, 1976.

/s/ ADRIAN A. SPEARS
Adrian A. Spears
United States District Judge

Government's Statement Initiating Transfer Proceeding (RI. 4-7)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

The Government's Statement with Respect to the Recommendations of the 75-2 Grand Jury That Grand Jury Transcripts and Documents Be Made Available to Other Courts

(Filed August 25, 1976)

The United States by its attorneys, John C. Danielson, Richard A. Ringhofer, Diane C. Lotko-Baker, Jeffrey D. Lewin, and John L. Gale states as follows:

1. On or about February 1, 1972 the United States of America filed a civil antitrust complaint in this Court entitled *United States* v. *Associated Milk Producers, Inc.*, which was docketed by the Clerk of this Court as SA 72 CA 49.

2. During 1972, there were pending in the District Courts of the United States sixteen or more civil antitrust cases against AMPI in which discovery had begun or was to begin under the Federal Rules of Civil Procedure.

3. Pursuant to orders of Judge D. W. Suttle, dated March 21, 1972, May 31, 1972, June 30, 1972, and July 25, 1972, discovery in *United States* v. *Associated Milk Producers, Inc.* was begun. Discovery was subsequently coordinated with certain antitrust cases then pending elsewhere in United States courts in the United States District Court for the Western District of Missouri under the Judicial Panel on Multidistrict Litigation in its docket JPML 83 entitled "Midwest Milk Monopolization Litigation" and was assigned to Judge John W. Oliver.

4. On or about July 20, 1972 Judges Suttle and Oliver ordered all the plaintiffs in the coordinated discovery to exchange documents and information with each other in the preparation of these cases for trial.

5. On or about January 25, 1974 some of the plaintiffs in the private suits filed motions for sanctions under Fed. R. Civ.P. 37 for AMPI's asserted failure to comply with discovery orders and failure to produce documents material to the JPML 83 cases. Those motions and cases are still pending, but the United States is not party to them.

6. On or about April 30, 1975 the Government's case was settled by consent decree and on or about May 19, 1976 the Eighth Circuit Court of Appeals denied appeals by some of the plaintiffs in the private cases opposing the settlement of the Government case.

7. On or about February 11, 1975 the United States commenced a grand jury investigation in the Western District of Texas of possible violations of 18 U.S.C. § 1503 and of other federal criminal statutes in connection with the activities and conduct of Associated Milk Producers, Inc., and its employees, officers, agents and attorneys during discovery in the JPML 83 cases. The grand jury investigation consisted of the taking of testimony and the subpoenaing of documents.

8. On or about August 6, 1976 the grand jury was discharged and no indictment was returned. At that time Charles E. Kimmell, Foreman 75-2 grand jury, submitted the following recommendations to Chief Judge Adrian A. Spears:

Recommendations of the 75-2 Grand Jury to you regarding the above-referenced investigation are:

1. That the transcripts developed by this Grand Jury in this investigation be retained in the custody of the Court.

2. That the personal records of individuals, such as IRS tax returns and calendars, received by the Grand Jury in this investigation be retained in the custody of the Court.

3. That the business files and records of Associated Milk Producers, Inc. received by the Grand Jury be made available to other courts pursuant to an appropriate Rule 6(e) motion.

9. On or about August 6, 1976 Chief Judge Adrian A. Spears ordered that the Clerk of the Court retain custody of all files and records consistent with 75-2 Grand Jury Request Number 1 and 2.

10. The grand jury transcripts are now located in the United States Attorney's office in San Antonio, and the documents are impounded in the custody of this Court's clerk in San Antonio.

11. Some documents in the Clerk's custody and the transcript of testimony taken by the grand jury may be material to the JPML 83 cases presently proceeding to trial in the United States District Court for the Western District of Missouri.

In view of the foregoing facts the United States, by its attorneys, states to the Court that the United States has no objection to the entry of such order as the Court deems appropriate to make the grand jury subpoenas, transcripts and documents available to Chief Judge Oliver for such use as he deems appropriate in connection with the aforesaid Rule 37 motions and the trial of the JPML 83 cases.

Respectfully submitted,

/s/ JOHN C. DANIELSON
John C. Danielson

/s/ DIANE C. LOTKO-BAKER
Diane C. Lotko-Baker

/s/ JEFFREY D. LEWIN
Jeffrey D. Lewin

/s/ RICHARD A. RINGHOFER
Richard A. Ringhofer

/s/ JOHN L. GALE
John L. Gale

Attorneys, Department of Justice

Room 2634, Everett M. Dirksen Bldg.
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(312) 353-7528

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

Addendum to the Government's Statement with Respect to the Recommendations of the 75-2 Grand Jury That Grand Jury Transcripts and Documents Be Made Available to Other Courts

(Filed August 25, 1976)

The United States Attorney hereby amends paragraph 10 of The Government's Statement with Respect to the Recommendations of the 75-2 Grand Jury that Grand Jury Transcripts and Documents be made Available to Other Courts.

Paragraph 10 should be amended to read as follows:

10. The Grand Jury transcripts and documents are impounded in the custody of this Court's clerk in San Antonio.

Respectfully submitted,

JOHN E. CLARK
United States Attorney

By /s/ JOHN M. PINCKNEY III
John M. Pinckney III
Assistant U.S. Attorney

Chief Judge Spears' Comments During October 1, 1976 Hearing (RI. 154-156)

THE COURT: But carrying that to its logical conclusion and assuming, as we must, that Judge Oliver knew there was an on-going grand jury investigation here in San Antonio, didn't we get the cart before the horse? Shouldn't we have waited for Judge Oliver, who knew the facts and circumstances about the grand jury investigation, to request it either through the United States Attorney there or through the Department of Justice, rather than dump 54 boxes of materials on him and expect him to know what it is when he has had no specific request—and we will get into this a little later—but in examining the pleadings and the briefs, I have seen no indication that there is anything in those files that would be material or relevant. I have seen nothing that would indicate that it couldn't have been, if it hasn't already been, disclosed otherwise through the discovery procedures, nor have I seen anything showing a particularized or compelling need for any particular document or any particular transcript. There is no indication that I have been able to find in the record that any witness testified contrary to what he testified to before the grand jury—it seems to me that those things that Judge Oliver should in the first instance have determined and then through an appropriate process call upon this Court, if he wanted, if he felt that the documents should be impounded, requesting that they be impounded and then indicating that as the litigation there progressed he would call upon the Court from time to time by certification to supply documents to him. Again, we are talking about something that, while it is relevant to this proceeding, it really doesn't get down to the basic proposition as I stated it to Mr. Klein originally, and that is, what I should do about it now.

Here are 54 boxes of papers and they are rather voluminous. I think one time I got a glimpse of them in the Clerk's room where they were set aside when AMPI brought them all in. I haven't seen them yet myself but I just know what the Clerk has said about them and what good, what purpose possibly could be served now by sending all that material to him? Why couldn't the same purpose be served by keeping the records here in San Antonio and perhaps supplying Judge Oliver with an inventory of what is here and a list of the transcripts that are here and then, if as and when somebody shows a particularized or compelling need for that document or that transcript or that subpoena, then a certification could be made and we could send him whatever is needed rather than sending the whole bundle.

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Materials Relating to the Transfer of the Grand Jury Inventory to the Western District of Missouri (RI. 245-56)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-76-CA-249

IN RE 1975-2 GRAND JURY INVESTIGATION OF
ASSOCIATED MILK PRODUCERS, INC.

AMPI's Motion to Determine Compliance with the Court's Order of October 1, 1976 and for Appropriate Relief

Movant, Associated Milk Producers, Inc. (AMPI), by and through its attorneys, respectfully moves this Court to inquire and/or conduct an evidentiary hearing to determine whether the Order issued on October 1, 1976 is being properly implemented. The reasons for this motion are fully set forth in the attached Supporting Memorandum. AMPI requests this Court to order appropriate relief, including return of the purported inventory, as more fully set forth in the Supporting Memorandum.

Respectfully submitted,

/s/ SIDNEY HARRIS
Sidney Harris
/s/ FRED KLEIN
Fred Klein

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6000

/s/ CRAIG L. AUSTIN
Craig L. Austin
711 Navarro, Suite 727
San Antonio, Texas 78205
(512) 222-2331

Attorneys for Associated Milk Producers, Inc.

Dated: November 29, 1976

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

Memorandum in Support of AMPI's Motion to Determine Compliance with the Court's Order of October 1, 1976 and for Appropriate Relief

(Filed December 1, 1976)

FACTUAL BACKGROUND

On October 1, 1976, this Court ordered that: "The Clerk of this Court is directed to promptly send to Judge John W. Oliver, as transferee judge, an inventory of the grand jury subpoenas, transcripts, and documents for his *in camera* inspection." It has come to the attention of counsel for AMPI that the above-quoted provision of this Court's October 1, 1976 Order may have been improperly complied with. For the reasons stated below, this Court should recall from Judge Oliver, the transferee judge, the alleged inventory which the Clerk of this Court has stated was sent to him on or about October 6, 1976, to inquire, or conduct an evidentiary hearing to determine whether said document is in compliance with paragraph 1 of this Court's October 1, 1976 Order and expunge any non-complying matter.* Furthermore, in view of the fact that counsel for AMPI, during the October 1, 1976 oral argument which led to the issuance of the Court's Order of October 1, 1976, requested a stay of any order providing for transfer of documents, and in view of the fact that the United States Court of Appeals on November 22, 1976, issued a stay of this Court's Order of October 1, 1976, pending AMPI's appeal, this Court should not retransmit said document to Judge Oliver, but should hold it pending the outcome of AMPI's appeal.

* United States v. Briggs, 514 F.2d 794, 806-807 (5th Cir. 1975).

During a recent pretrial conference before Judge John W. Oliver on November 15 and 16, 1976, in the case of *Alexander et al.* v. *NFO* v. *AMPI,* the court afforded AMPI counsel a brief look at that portion of the alleged document inventory sent to Judge Oliver by the Clerk of this Court which purports to list the documents that AMPI produced before the grand jury, as well as the opportunity to examine other items on the subject in the court's file. The alleged document inventory apparently had not been sent to Judge Oliver with any indication that it was to be held *in camera.** Moreover, the list contained many asterisks on certain of the documents with an explanation that the asterisked documents have been previously produced in JPML No. 83. In addition, it appeared that the list contained handwritten editorial comments concerning certain documents. (Exhibit A)

The Court's file also contained correspondence between Judge Oliver and Mrs. Munford, the Clerk of this Court, relating to the transmission of information pursuant to paragraph 1 of the Court's October 1, 1976 Order which does not appear in the docket of this case. It appeared from the brief examination of this correspondence that the so called inventory had been prepared by Mr. Danielson, the former special attorney in charge of the now terminated grand jury investigation of AMPI in this district, rather than by the Clerk of this Court. Also it appeared in a letter from Mrs. Munford to Judge Oliver that Mr. Danielson was in the process of preparing a summary of each of the documents on the inventory and that such summary would be transmitted to Judge Oliver as soon as it was received by Mrs. Munford. *Id.*

* AMPI counsel informed Judge Oliver's law clerk that pursuant to the terms of this Court's Order, the alleged inventory was supposed to be held *in camera* and according to AMPI counsel's information, this list was then placed in an *in camera* status.

The placing of asterisks next to certain documents and indicating that said documents have previously been produced in JPML No. 83 together with certain handwritten comments apparently relating to the status or location of documents during discovery in the private antitrust cases is most unusual. The source of such information could not be the Clerk of this Court who has no knowledge of the subject matter of these documents. It most certainly would have to be the former special attorney, Mr. Danielson, or a member of his staff, who were involved in the grand jury investigation. The Court did not provide that Mr. Danielson or his staff were to participate in any way in the preparation of the inventory to be sent to Judge Oliver* and it would further seem to be the most gross violation of the Court's Order for editorial comments about any or all of the documents to be included in such an inventory. The impression given to Judge Oliver would naturally be that those documents which were not accompanied by an asterisk were not produced in discovery in the antitrust cases before him, when they should have been.**

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* This Court did not even permit Mr. Danielson to segregate the grand jury materials when he specifically requested permission to do so. Trans. 10/1/76 Hearing, at 56-58.

** It appears to AMPI counsel, after only the most brief look at the so-called inventory, that certain documents which were in fact produced in JPML No. 83 were not accompanied by an asterisk on the inventory listing. Mr. Danielson was only involved in the antitrust case of United States v. AMPI at the tail end of the litigation, and he was unfamiliar with the discovery which had gone on earlier; nor was he familiar with the discovery in the private antitrust cases in JPML No. 83 which preceded discovery in United States v. AMPI. This is even more applicable to Mr. Danielson's staff, most of whom were not involved to any extent in the antitrust cases. Therefore, apart from the impropriety of the purported inventory, its accuracy is highly questionable.

A similar tactic was used with AMPI counsel. Mr. Danielson sent to AMPI counsel a document purporting to be that portion of the inventory related to the documents which AMPI had produced to the grand jury. This also contained certain handwritten asterisks appearing to designate those documents which were produced by AMPI in JPML No. 83. (*See* Exhibit B) Mr. Danielson's letter gives the impression that attached to it was the "inventory" which was called for by paragraph 1 of this Court's Order of October 1, 1976. In fact, the purported "inventory" listed no documents, but merely contained a list of box numbers. (*See* Exhibit B, p. 2) The effect was to lull AMPI counsel into the false impression that the "inventory" attached to the October 6, 1976 letter was in fact the inventory that was being sent to Judge Oliver, when in fact this was not the case.

Further, in his October 6, 1976 letter, Mr. Danielson stated that he had added an asterisk only on AMPI's list to "those documents which have previously been produced by AMPI in JPML No. 83."* In the October 18th letter, AMPI counsel complained that the natural impression of Mr. Danielson's comments concerning the asterisks would be to lead counsel for plaintiffs in the private antitrust cases to believe that certain documents which should have been produced by AMPI during discovery in the antitrust case were not produced, and indeed a copy of Mr. Danielson's October 6, 1976 letter (without enclosures) was sent to Mr. Green, counsel for NFO.** Pre-

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* Upon receipt of this letter, AMPI counsel returned the asterisked list to Mr. Danielson with its letter of October 18, 1976, a copy of which was previously sent to this Court.

** One searches the October 1st Order in vain for any justification for sending a copy of this letter to Mr. Green. Indeed, NFO had not even been made a party to this action when Mr. Danielson's letter was sent.

dictably, counsel for several plaintiffs in the JPML No. 83 antitrust cases have drawn the same conclusion from Mr. Danielson's letter and have requested from AMPI counsel the documents produced to the grand jury, but not produced during discovery in the antitrust cases. (*See, e.g.*, Exhibits C and D)

After receipt of his October 6, 1976 letter, counsel for AMPI phoned Mr. Danielson for an explanation. Mr. Danielson stated that the asterisked documents only meant that, to his knowledge, such documents in fact had been produced during discovery in JPML No. 83, and that the lack of an asterisk on a document did not necessarily mean that the document had not been or should have been produced therein.

A person must be responsible for the natural implications of his statements. The failure of Mr. Danielson to fully explain the meaning of his asterisks to counsel for parties adverse to AMPI, to this Court, or to Judge Oliver, when the failure to fully explain leads to an implication very injurious to AMPI, is inexcusable. This is particularly true when such comments are made by a person who occupies so responsible and sensitive a position, who has just concluded a grand jury investigation directed at AMPI relating to alleged obstruction of justice, and who must comply with the strict admonitions placed upon such special counsel by his oath of office. It is well-established that grand jury secrecy can be breached indirectly by disclosure of some facts, as well as directly through disclosure of the actual documents. *See United States* v. *Hughes*, 429 F.2d 1293 (10th Cir. 1970); *Application of State of California*, 195 F.Supp. 37, 40 (E.D.Pa. 1961); *United States* v. *Stein*, 18 F.R.D. 17, 19 (S.D.N.Y. 1955).* A determination should be made by this Court as to the reasons for and consequences of such conduct.

AMPI requested a stay of any order issued by this Court on October 1, 1976. Trans. 10/1/76 Hearing, at 16. Subsequently, on October 7, 1976, AMPI filed a notice of appeal and an application for a stay pending appeal from paragraph one of the October 1st order only to learn that the inventory had already been transferred the previous day. Yet, after denying AMPI's application for stay pending appeal, this Court did grant an interim stay of ten days to enable AMPI to seek appellate review of the stay application. In the interest of justice and to preserve the jurisdiction of the United States Court of Appeals for the Fifth Circuit to award complete relief to AMPI on its appeal, it would have been more appropriate to grant a ten-day stay on October 1st to prevent the clerk from immediately transferring the inventory, thus providing AMPI with an effective opportunity to obtain an appellate court determination of its stay application. On November 22, 1976 the Fifth Circuit granted AMPI's motion for a stay pending appeal. Therefore, to fully effectuate the intent of the Fifth Circuit in granting the stay, this Court should seek return of the inventory transferred to Judge Oliver which may have been prematurely supplied and hold it *in camera* pending the outcome of the appeal.*

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* On August 27, 1976 Mr. Danielson sent a letter to Judge Oliver notifying him of this Court's August 6, 1976 transfer order wherein he stated that this Court "determined that these matters may be material to proceedings pending before your Court." (Exhibit E) At the October 1st hearing it was noted that such action may have resulted in a breach of grand jury secrecy. Trans. 10/1/76 Hearing, at 31-32.

* As the attached affidavit (Exhibit A) shows, the asterisks and editorial comments were handwritten, whereas the inventory list was typed. It is not known whether this Court has in its possession a copy of the precise "inventory" document which is now in the possession of Judge Oliver. In any event, this Court should re-

The National Farmers' Organization (NFO) should not participate in any evidentiary hearing to determine whether there has been compliance with paragraph one of this Court's order. The purpose of allowing NFO to intervene was to enable it to protect whatever interest it may have in the grand jury material by argument *amicus curiae,* and by participating in appellate proceedings.* It was certainly not the intent of this Court to grant NFO access to the material, particularly after finding that no showing had been made which demonstrated a need for it. Trans. 10/1/76 Hearing, at 25. If NFO was to obtain access to these documents it was to be through Judge Oliver's court. The evidentiary hearing will necessarily involve examination of the inventory transmitted to Judge Oliver which was ordered to be conducted on an *in camera* basis. If NFO is allowed to participate in this hearing, the grant of intervention may result in a breach of grand jury secrecy and thereby subvert the proceedings and moot AMPI's appeal.

Conditions and limitations on intervention under F.R. Civ. P. 24(a) have been imposed when necessary to preserve the integrity of the main proceeding. As the Advisory Committee Note to the 1966 Amendment to Rule 24(a) states: "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to requirements of efficient conduct of the proceedings." 39 F.R.D. 109, 111. *See also*

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quest Judge Oliver to return the "inventory" document to it, in aid of its inquiry or evidentiary hearing to determine whether paragraph 1 of the Order of October 1, 1976 has been properly carried out. In a recent pretrial conference in the private antitrust cases in the Western District of Missouri, Judge Oliver indicated that as a matter of "comity" he would act in accordance with the request of the Western District of Texas. (Exhibit A)

* AMPI has appealed from this Court's order allowing NFO to intervene.

McDonald v. *E. J. Lavino Co.,* 430 F.2d 1065, 1073 n.7 (5th Cir. 1970). *Cf. Pepsico* v. *FTC,* 472 F.2d 179 (2d Cir. 1972), *cert. denied,* 414 U.S. 876 (1973); *Smuck* v. *Hobson,* 408 F.2d 175, 180 (D.C. Cir. 1969); Shapiro, "Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators," 81 *Harv. L. Rev.* 721, 752-756 (1968). Since the proceedings will be undermined if NFO gains access to the material ordered to be held *in camera,* NFO should not participate in the evidentiary hearing. If, however, NFO does participate in such hearing, procedures should be utilized which will preserve the secrecy of the grand jury material.

If the Court finds that its order has been violated it should take all necessary and appropriate relief to protect and promote the integrity of its mandates. *See, e.g., In re Dellinger,* 502 F.2d 813 (7th Cir. 1974); *In re Niblack,* 476 F.2d (D.C. Cir.), *cert. denied,* 414 U.S. 909 (1973); *United States* v. *Greyhound Corp.,* 363 F.Supp. 525 (N.D. Ill. 1973), *supplemented,* 370 F.Supp. 881 (N.D. Ill.), *aff'd,* 508 F.2d 529 (7th Cir. 1974).

Relief Requested

(1) This Court should inquire into the manner in which paragraph one of the October 1, 1976 Order has been implemented to determine if that Order has been violated, and, if necessary, conduct an evidentiary hearing on such issue in which the National Farmers' Organization should not be permitted to participate.

(2) In aid of the inquiry or hearing, this Court should request that Judge Oliver return what purports to be the inventory which he has received from the Clerk of this Court, and this Court should expunge any comments, asterisks or any other editorialization.

(3) This Court should not return the expunged inventory to Judge Oliver but should hold it *in camera* pending the outcome of AMPI's appeal.

(4) This Court should examine any correspondence between the Clerk of this Court and Judge Oliver to determine whether it is relevant to the issue of compliance with the order in question, or to AMPI's appeal in this case. If it is, it should be filed as of record in this case unless such filing would result in a breach of grand jury secrecy, in which case it should be held *in camera*.

(5) This Court should take any further action which it feels is appropriate to insure continued compliance with the October 1, 1976 Order and to protect the integrity of its future mandates.

Respectfully submitted,

/s/ Sidney Harris
Sidney Harris

/s/ Fred Klein
Fred Klein

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/s/ Craig L. Austin
Craig L. Austin

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Dated: November 29, 1976

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

Affidavit of Sidney Harris, Esq.

After being deposed and duly sworn, affiant hereby states as follows:

1. Affiant is an attorney with the firm of Arent, Fox, Kintner, Plotkin & Kahn in Washington, D.C. and is the lead attorney of record for Associated Milk Producers, Inc. (AMPI) in the proceeding styled *Alexander et al.* v. *The National Farmers' Organization, Inc.*, CA No. 19191-1.

2. During the week of November 15, 1976, affiant participated actively in pretrial proceedings in *Alexander et al.* v. *The National Farmers' Organization, Inc.*, conducted by Judge Oliver in the Western District of Missouri.

3. During the course of these pretrial proceedings, Judge Oliver's clerk afforded affiant a brief opportunity to inspect that portion of the inventory sent to Judge Oliver by the Clerk of this Court which purports to list documents produced by AMPI to the above described grand jury, as well as correspondence between Mrs. Munford, Deputy Clerk of the Western District of Texas and Judge Oliver.

4. One letter from Mrs. Munford apparently states that the inventory list had been prepared by Mr. John C. Danielson. The docket file also indicated that Mr. Danielson was currently preparing a summary of individual grand jury documents based on their subject matter for submission to Mrs. Munford, and that she would then immediately send it to Judge Oliver.

5. The alleged inventory of documents included handwritten asterisks next to certain document descriptions, and there appeared also to be handwritten editorial comments next to or under certain documents.

6. These materials were not in an *in camera* file but rather existed on the public record, available for anyone to inspect. Affiant notified Judge Oliver's law clerk, Mr. Paul Beck, of the *in camera* status of the inventory, and apparently Mr. Beck then placed the inventory in an *in camera* status.

7. During the course of this pretrial proceeding Judge Oliver stated on the record that as a matter of "comity" he would act in conformance with the orders of the Western District of Texas and the United States Court of Appeals for the Fifth Circuit in this matter.

Further affiant saith not.

/s/ SIDNEY HARRIS
Sidney Harris

(Subscription Omitted in Printing)